

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MINHNGA NGUYEN,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

CASE NO. C15-793RAJ

ORDER

I. INTRODUCTION

This matter comes before the Court on Defendant Boeing Company's ("Defendant") Motion to Dismiss (Dkt. # 12) and Plaintiff Minhnga Nguyen's ("Plaintiff") Motion for Summary Judgment (Dkt. # 14). For the reasons set forth below, the Court hereby **GRANTS** Defendant's Motion and **DENIES as MOOT** Plaintiff's Motion.

II. BACKGROUND

The facts set forth herein are derived from Plaintiff's Complaint. Dkt. # 1. Plaintiff repeats the vast majority of these allegations – though with a few wrinkles – throughout her various filings, including her Motion for Summary Judgment (Dkt. # 14), her opposition to Defendant's Motion to Dismiss (Dkt. # 15), the "supplement" to her motion for summary judgment (Dkt. # 18),¹ and her "Request to Admit Witness Testimony" (Dkt. # 21).²

¹ Defendant has filed a surreply moving to strike this document. See Dkt. # 20. As Defendant rightly argues, Plaintiff's "supplement" was not timely filed. See Local Rules W.D. Wash. LCR ORDER – 1

1 Plaintiff alleges that she began working for Defendant in June 1991, working as an
 2 electrical engineer. *See* Dkt. # 1 (“Compl.”) at 2. Defendant subsequently terminated
 3 Plaintiff’s employment in November 2014. *See id.* Plaintiff claims that she was harassed
 4 and discriminated against based on her race, national origin, sex, and terminated in
 5 retaliation for complaining about such. *See id.* (“I was discharged as a result of their
 6 discrimination and retaliation acts against me. Their actions were based on my race,
 7 Asian, my limited English, and retaliation of my protests of discrimination.”).

8 Plaintiff alleges several instances of discrimination in her Complaint. These
 9 allegations include directions to use leave without pay for a sick day after she felt sick
 10 due to the theft of her eyeglasses (*see id.* at 2-3), to return her laptop (*id.* at 3), suspension
 11 from work for improper use of sick leave (*id.*), towing her car and issuing a parking ticket
 12 (*id.*), “triple disciplin[ing]” her “with a written warning on 10/15/14, for a first time
 13 mistake” (*id.*), a human resource manager’s admission that she declined to forward
 14 Plaintiff’s discrimination complaint to Defendant’s Equal Employment Opportunity
 15 office (*id.*), and an apparent refusal to recognize her flex schedule (*id.*).

16 In her other pleadings, Plaintiff adds allegations that although she was denied her
 17 request to flex her schedule (*see* Dkt. # 14 at 2) but that the request was subsequently
 18 approved (*see id.* at 1). Plaintiff alleges that Defendant approved male employees to
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20 7(d)(3) (“Any reply papers shall be filed and served no later than the noting date.”). The noting
 21 date for Plaintiff’s Motion was August 28, 2015 (*see* Dkt. # 14) while Plaintiff’s “supplement”
 22 was filed on September 9, 2015 (*see* Dkt. # 18). While the Court is inclined to strike Plaintiff’s
 23 untimely filing, it declines to do so in light of Plaintiff’s pro se status. *See Waters v. Young*, 100
 F.3d 1437, 1441 (9th Cir. 1996) (“this court has long sought to ensure that pro se litigants do not
 unwittingly fall victim to procedural requirements that they may, with some assistance from the
 court, be able to satisfy.”).

24 ² Defendant filed a surreply seeking to strike this document as untimely. *See* Dkt. # 21. The
 25 Court agrees as this document as filed well past the deadline for filing reply briefs (*see* Local
 26 Rules W.D. Wash. LCR 7(d)(3)), constitutes an improper surreply (*see* Local Rules W.D. Wash.
 27 LCR 7(g)) is of limited relevance to the issues at hand (*see* Fed. R. Evid. 401). The Court
 28 declines to strike the untimely filing in light of Plaintiff’s pro se status (*see Waters*, 100 F.3d at
 1441), but will decline to consider the attached “Declaration of Ted Yan” as it is irrelevant. Mr.
 Yan himself admits that he left the systems engineering team prior to Plaintiff’s termination and
 does not know why Plaintiff was discharged from her position. *See* Dkt. # 21 at 6 ¶¶ 3-4.

1 work an alternative flex schedule but denied her request to do so. *See id.* at 2.
 2 Additionally, Plaintiff alleges that not a single one of Defendant's male employees was
 3 refused a day of sick leave or suspended for taking sick leave. *See id.* Plaintiff also
 4 clarifies that on the day she was discharged, she fell unconscious and injured her neck
 5 and shoulder. *Id.* According to Plaintiff, a human resources manager called security to
 6 escort Plaintiff out and threatened to throw her in jail, but did no such thing with any
 7 male employee. *Id.* Plaintiff also seeks to add age discrimination claims. *See id.* at 3.
 8 Finally, Plaintiff newly alleges that Defendant violated the Age Discrimination in
 9 Employment Act ("ADEA") when it fired her. *See id.*

10 Plaintiff filed a charge with the Equal Employment Opportunity Commission
 11 ("EEOC"), which was dismissed on March 9, 2015. *See* Compl. at 26. That charge
 12 claimed only that Plaintiff was discriminated based on race, sex, and in retaliation. *Id.* at
 13 24. The EEOC issued a right to sue notice (*id.* at 26) but it appears that the EEOC
 14 revoked that determination in a subsequent letter dated May 15, 2015 (*see* Dkt. # 13-1
 15 Ex. A).³ Subsequent to the May 15, 2015 letter, the EEOC issued a letter indicating that
 16 it would be unable to investigate claims of race discrimination and retaliation because of
 17 the inclusion of those claims in the instant suit. *See* Dkt. # 15 at 9. The EEOC did,
 18 however, indicate that it would continue to investigate Plaintiff's sex discrimination
 19 claim. *Id.*

20 III. LEGAL STANDARD

21 Fed. R. Civ. P. 12(b)(6) permits a court to dismiss a complaint for failure to state a
 22 claim. The rule requires the court to assume the truth of the complaint's factual
 23 allegations and credit all reasonable inferences arising from those allegations. *Sanders v.*
 24 *Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court "need not accept as true conclusory

25 ³ The Court **GRANTS** Defendant's Request for Judicial Notice of the EEOC letter. Courts are
 26 permitted to take judicial notice under Federal Rule of Evidence 201 of EEOC proceedings. *See*
 27 *Adetuyi v. City & Cty. of San Francisco*, 63 F. Supp. 3d 1073, 1080-81 (N.D. Cal. 2014) (taking
 28 judicial notice of EEOC charges and right to sue letters); *see also Cunningham v. Litton Indus.*,
 413 F.2d 887, 889 n.2 (9th Cir. 1969) (proper to take judicial notice of EEOC proceedings).

1 allegations that are contradicted by documents referred to in the complaint.” *Manzarek v.*
 2 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The plaintiff must
 3 point to factual allegations that “state a claim to relief that is plausible on its face.” *Bell*
 4 *Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the plaintiff succeeds, the complaint
 5 avoids dismissal if there is “any set of facts consistent with the allegations in the
 6 complaint” that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S.
 7 662, 679 (2009).

8 A court typically cannot consider evidence beyond the four corners of the
 9 complaint, although it may rely on a document to which the complaint refers if the
 10 document is central to the party’s claims and its authenticity is not in question. *Marder v.*
 11 *Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may also consider evidence subject to
 12 judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

13 Where a plaintiff proceeds *pro se*, the court must construe his “complaints
 14 liberally even when evaluating it under the *Iqbal* standard.” *Johnson v. Lucent Techs.*
 15 *Inc.*, 653 F.3d 1000, 1011 (9th Cir. 2011) (citing *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th
 16 Cir. 2010)). “Furthermore, ‘[l]eave to amend should be granted unless the pleading could
 17 not possibly be cured by the allegation of other facts, and should be granted more
 18 liberally to pro se plaintiffs.’” *Id.* (quoting *McQuillion v. Schwarzenegger*, 369 F.3d
 19 1091, 1099 (9th Cir. 2004)).

20 IV. ANALYSIS

21 Before this Court can determine the substance of either Defendant or Plaintiff’s
 22 merits-based challenges, it must ascertain whether it has subject matter jurisdiction over
 23 the suit. “In order for a court to have subject matter jurisdiction over a Title VII claim, an
 24 individual is required to exhaust his administrative remedies by either ‘filing a timely
 25 charge with the EEOC, or the appropriate state agency, thereby affording the agency an
 26 opportunity to investigate the charge.’” *Arthur v. Whitman Cty.*, 24 F. Supp. 3d 1024,
 27 1031 (E.D. Wash. 2014) (quoting *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1099 (9th

1 Cir. 2002)). Once the EEOC has issued a notice of right to sue, the plaintiff must file her
2 lawsuit within 90 days. *See* 42 U.S.C. § 2000e-5(f).

3 If the EEOC decides to reconsider its initial determination, it must notify the
4 parties of its intent to reconsider. *See* 29 C.F.R. § 1601.19(b). Crucially, if the EEOC
5 issues such a notice of intent to reconsider, then the regulation further provides:

6 If such notice of intent to reconsider is issued within 90 days of receipt of
7 the final no cause determination, and the person claiming to be aggrieved or
8 the person on whose behalf a charge was filed has not filed suit and did not
9 request and receive a notice of right to sue pursuant to § 1601.28(a) (1) or
10 (2), the notice of intent to reconsider shall vacate the letter of determination
11 and shall revoke the charging party's right to bring suit within 90 days.

12 *Id.*

13 The original no cause determination was issued on March 9, 2015. *See* Compl. at
14 26. The EEOC's notice of intent to reconsider was issued on May 15, 2015, well within
15 the 90 day period, meaning that Plaintiff's right to bring suit was revoked as of that date.
16 *See Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 413 (5th Cir. 2003) (holding that
17 notice of intent to reconsider valid as of date of postmark). *See* Dkt. # 13-1 Ex. A. The
18 instant suit was not commenced until May 20, 2015 (*see* Compl.), meaning that under the
19 EEOC's regulations,.

20 Plaintiff does submit another letter from the EEOC (albeit one that Defendant
21 claims is unauthenticated) which suggests that after having received notice of the instant
22 lawsuit, the EEOC separated Plaintiff's claims based on race and retaliation from her
23 claims based on gender discrimination, the former as part of the instant suit and the latter
24 as part of the EEOC investigation. *See* Dkt. # 15 at 9. Nevertheless, to date, Plaintiff has
25 not provided another right to sue notice, and none of the information contained in that
26 letter suggests that the EEOC had given Plaintiff another notice of her right to sue.

27 Without that, the Court cannot consider Plaintiff's claims.⁴

28 ⁴ There is some question as to whether Plaintiff's right to sue on her proposed ADEA claim may
be revoked under this regulation. *See McCray v. Corry Mfg. Co.*, 61 F.3d 224, 228 (3d Cir.
1995). Of course, Plaintiff did not charge discrimination on the basis of age in her original
EEOC charge (*see* Compl. at 24) nor did she allege it in the body of her original complaint,
though it may be "reasonably related" to the allegations in that charge (*see Albano v. Schering-*
ORDER – 5

1 What this means is that the Court must **DISMISS** Plaintiff's Complaint for lack of
2 subject matter jurisdiction. However, the Court will provide Plaintiff with **30 days leave**
3 **to amend** her Complaint. In order for Plaintiff's suit to continue, she must provide a
4 **valid** right to sue letter from the EEOC covering her claims, issued **after** the EEOC issued
5 its notice of intent to reconsider. Until she produces such a notice, the Court cannot
6 exercise jurisdiction over her claims. In other words, if Plaintiff has been issued a second
7 notice of right to sue, she should file an amended complaint attaching at least (1) her
8 original EEOC charge (attached at page 24 of the current Complaint) and (2) the second
9 notice of right to sue.

10 If Plaintiff has not yet received a second notice of right to sue, then her claims
11 likely are not yet ripe. Plaintiff may advise the EEOC that she wishes that they complete
12 their investigation first. Alternatively, Plaintiff may request, in writing, a notice of right
13 to sue covering all of her claims pursuant to 29 C.F.R. §1601.28(a) so that she may
14 pursue them in the instant lawsuit. Either way, Plaintiff is advised to produce a copy of
15 this Order to the EEOC and to inform them and the Court of her decision.

16 However Plaintiff chooses, must produce a valid notice of right to sue **within 30**
17 **days** of this Order, advise this Court why she needs additional time to do so, or inform
18 the Court that she has decided to allow the EEOC to continue its investigation. Barring
19 such action, the Court will dismiss Defendant and close this case.

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Plough Corp., 912 F.2d 384, 386 (9th Cir. 1990)). The Court declines to address that question at
this time, given Plaintiff's failure to present a valid right to sue notice and because that issue has
not been properly raised with the Court.

28 ORDER – 6

V. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's Motion to Dismiss (Dkt. # 12) and **DENIES as MOOT** Plaintiff's Motion for Summary Judgment (Dkt. # 14). The Court grants Plaintiff **30 days leave** to file an amended complaint attaching a valid notice of right to sue or advising this Court why Plaintiff has not yet done so, either because she requires additional time or because she has decided to permit the EEOC to complete its investigation.

DATED this 7th day of December, 2015.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Court